No. 86-912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION and SPRINGFIELD DRIVE-INS, INC.,

Petitioners,

-against-

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This lawsuit was brought by a fast food restaurant franchisee (petitioners herein) claiming lost profits in the conduct of the franchised business. The lawsuit asserted the failure to provide a "viable and competitive" franchise system over the ten years for which damages were claimed. The defendants (respondents herein) were the franchisor, Burger Chef Systems, Inc., and Burger Chef's former corporate parent, General Foods Corporation.

At the conclusion of petitioners' case, the district court properly found that the franchise agreement was fulfilled in every respect and dismissed petitioners' breach of contract claim. The district court also properly found that the franchise agreement was the only legal relationship between the parties and dismissed a claim alleging breach of fiduciary duty. A catch–all state fraud claim was allowed to go to the jury. The jury returned a verdict in favor of petitioners for $4.8 million in extra profits allegedly lost by petitioners during the ten–year period of the alleged fraud and $9.2 million in punitive damages.

After reviewing the governing law and the trial record "with utmost care," 797 F.2d at 1417, and considering "only the evidence favorable to [petitioners] and the reasonable inference to be drawn from that evidence," *Id.* at 1410, the Court of Appeals for the Seventh Circuit unanimously concluded that the fraud verdict was not supported by the evidence and could not stand under state law. The Court of Appeals found that none of the essential elements of a fraud claim had been established — i.e. there were no actionable misrepresentations, no justifiable reliance, and no damages related to the alleged fraud. The Court also held as a further basis for its decision that the twenty–four general releases executed by the parties at different times throughout their relationship barred this action as a matter of state law.

In view of the factual record of this case, and the alternate bases for the judgment below, the questions sought to be presented by petitioners should be restated:

1. Whether it was error for the Seventh Circuit Court of Appeals to reverse the district court's denial of respondents' motion for judgment notwithstanding the verdict when, after a careful review of the entire record and consideration of the applicable state law, the court concluded that "there is no substantial evidence or reasonable inference to be adduced therefrom to support [any] essential element of the claim, i.e., the evidence [points] unerringly to a conclusion not reached by the jury."

2. Whether it was error for the Seventh Circuit Court of Appeals to conclude that, as a matter of state law, the twenty–four general releases executed by the parties provide an alternative and independent ground to upset the jury verdict.

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IN THE
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AL VAUGHN, MARJORIE VAUGHN, ALGON CORPORATION
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Respondents, General Foods Corporation ("General Foods") and Burger Chef Systems, Inc. ("Burger Chef"),[1]

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1. Pursuant to Rule 28.1 of this Court's rules, respondents state that General Foods Corporation is a wholly–owned subsidiary of Philip Morris Corporation and that Burger Chef Systems, Inc. is a wholly–owned subsidiary of Hardees' Food Systems, Inc. which in turn is a wholly–owned subsidiary of

submit this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit of Petitioners Al Vaughn, Marjorie Vaughn, Algon Corporation and Springfield Drive–Ins, Inc. (collectively "Vaughns").

COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case repeatedly misstates the record evidence and the opinion of the Court of Appeals for the Seventh Circuit. This Court is respectfully referred to the opinion of the Court of Appeals for an accurate statement of the case. 797 F.2d 1403 (7th Cir. 1986)(reproduced as appendix A to the Vaughn's petition). Following the Court of Appeals' decision, petitioners moved for a rehearing and suggested a rehearing *en banc*. This motion was denied on September 9, 1986 after no judge in the regular service of the Seventh Circuit requested a vote on the suggestion of rehearing *en banc* and all the judges on the panel hearing the appeal voted to deny rehearing. *See* Petitioners' appendix E. Petitioners then moved for a stay of the issuance of the mandate pending appeal to this Court. This motion was denied on September 24, 1986, with the Court of Appeals observing:

> The issues which the appellees propose to present to the Supreme Court of the United States in their petition for certiorari were thoroughly considered by the panel in its deliberations on this case. Moreover, these issues are very fact–specific and dependent on questions of state law. Since there is no reasonable probability that the Supreme Court will grant certiorari and even less of a possibility that, if certiorari were granted, further review would result in reversal, the motion for stay of mandate pending application for a writ of certiorari is DENIED.

Respondents' appendix A.

REASONS TO DENY THE WRIT

This appeal raises no "special or important" issues, a prerequisite for the grant of a petition for a writ of certiorari. Although petitioners attempt to cloak their argument in the Seventh Amendment and raise an alleged conflict between the standards for granting a judgment notwithstanding a verdict under federal and state law, there are no substantial federal issues presented in this case. The Court of Appeals was explicitly aware of its limited role in reviewing jury verdicts in light of the Seventh Amendment, 797 F.2d at 1417, and the petitioners ultimately do not substantively dispute the standard applied by the Court of Appeals in conducting its limited review in light of the fact that the stringent state standard applied here is virtually identical to the federal standard for which they now argue.

In the final analysis, the petitioners seek to have this Court: 1) render an advisory opinion as to which of two virtually identical legal standards for a judgment N.O.V. applies; 2) embark on a review of an extensive trial record to determine if evidence the Court of Appeals was unable to find supports the *prima facie* elements of common law fraud under state law; and, finally, 3) review the Seventh Circuit's interpretation of state law in light of the factual record. Petitioners' attempt to enmesh this Court in any of these three exercises is wholly inappropriate. *See generally The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."), *cited with approval in Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *Butner v. United States*, 440 U.S. 48, 57–58 (1979) ("We decline to review the state–law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.").

A. THE ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT, BASED ON STATE LAW AND THE FACTUAL RECORD IN THIS CASE, DOES NOT PRESENT A CONSTITUTIONAL QUESTION FOR THIS COURT TO DECIDE.

A court may grant judgment notwithstanding the verdict when a jury's verdict is not supported by the law. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1966) ("[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial."); *Powell v. J.T. Posey Co.*, 766 F.2d 131, 135 (3d Cir. 1985) (because evidence presented at trial was insufficient as a matter of law, district court in diversity action should have granted motion for judgment notwithstanding the verdict).

Petitioners cite this Court's opinion in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), in support of the undisputed proposition that the Seventh Amendment places substantial limitations on an appellate court's power to review a jury verdict. However, while restrictions are indeed placed upon a reviewing court, the very case cited by petitioners and a long line of this Court's decisions have held that an appellate court has not only the power, but the obligation, to review the record and determine whether the evidence is sufficient to support the jury's verdict under the applicable law. *See, e.g., Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2511 (1986) (verdict must be directed if, under the governing law, there can be but one reasonable conclusion as to the verdict)(citing *Brady v. Southern Ry.*, 320 U.S. 476, 479–480 (1943)).

In their attempt to seize the attention of this Court, petitioners have mischaracterized the Court of Appeals' review of the record below as a usurpation of the jury's role. Petition at 13. The Court of Appeals determined whether there was a submissible issue for the jury with a careful eye to the Seventh

Amendment. In directing entry of judgment for respondents, the Court of Appeals stated:

> Jury verdicts are not to be overturned lightly. Before taking such a step, a reviewing court must not only ascertain carefully the governing law but also review, with the utmost care, the record of trial. In undertaking this latter task, we must tread carefully. Fact–finding is the jury's role and the parties have a right to expect that, mindful of the guarantee of the seventh amendment, we shall not intrude upon that role and substitute our own judgment. Nevertheless, it is our function to determine, in the final analysis, whether the law and the evidence support the jury's verdict. Here, we must conclude that the verdict cannot stand.

797 F.2d at 1417.

The Court of Appeals concluded that, as a matter of law, the statements made by General Foods and Burger Chef to Burger Chef franchisees could not constitute actionable fraud under state law. The Court of Appeals correctly set forth the law of fraud in Indiana, as interpreted by the Indiana state courts as well as by the Seventh Circuit, and concluded that the petitioners had failed to establish the requisite elements of a state fraud claim. This is not a case where the lower court has resolved issues of fact or credibility against petitioners or has disregarded the law of the state in which it sits. The court applied the law of Indiana to what, on appeal, was essentially an undisputed record, with all inferences drawn in favor of petitioners. It is this application of state law to the facts most favorable to petitioners which the petitioners ultimately seek to put before this Court.[2] The Court of Appeals correctly

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2. The deference to the record most favorable to petitioners has not stopped them either in this Court or the Court of Appeals from misstating that record. An example of Petitioners' misstatement of the record is their

determined that petitioners' legal arguments on this record as to whether there was actionable fraud under state law were lacking in merit. The factual record and analysis of the law is set out at length in its opinion. It is now inappropriate to seek further factual review or review in this Court of the state law issues which have been given extensive attention by the Court of Appeals. *See United States v. Johnston, supra*; *Butner v. United States, supra.*

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repeated allegation of an alleged "target date" for the sale of Burger Chef. There is not one shred of evidence in the record to support the fantastic proposition that in 1971 General Foods made a decision to "target" 1981 as the year to sell its Burger Chef subsidiary and then systematically and intentionally destroyed its subsidiary over that ten–year period. Petitioners' first reference to the mythical target date can be found in the third paragraph of page four of their petition. Of the five references cited in support of the alleged "target date" for sale, three are totally irrelevant (E18, B11, B234), and two, which merely discuss a sale as one among several business options, never mention a planned sale of the system targeted for 1981 (E102, PX633).

In the second paragraph of page seven, petitioners cite E58 in support of their unfounded contention that in September of 1978 General Foods "reconfirmed" the end of 1981 as the target date for the sale of Burger Chef. Not only does the Finance Committee Report cited not support a 1981 date, or any other "target date" for sale, it refers to a two phase strategic growth plan, the second phase to end in fiscal 1983–two years after petitioners' contrived 1981 target date. Subsequent references made by petitioners to a ten–year target date appear on pages nine and eleven without record citation.

B. NO ISSUE CONCERNING THE APPROPRIATE STANDARD OF REVIEW FOR A JUDGMENT NOTWITHSTANDING THE VERDICT IS PRESENTED BY THIS CASE. THE COURT OF APPEALS' CONCLUSION THAT, AS A MATTER OF LAW, THERE WAS INSUFFICIENT EVIDENCE TO CREATE AN ISSUE OF FACT FOR THE JURY IS SUPPORTED BY BOTH THE STATE STANDARD APPLIED BY THE COURT OF APPEALS AND THE VIRTUALLY IDENTICAL FEDERAL STANDARD FOR WHICH PETITIONERS NOW ARGUE.

In their statement of questions presented for review, petitioners assert that this case raises an issue concerning the appropriate standard of review appellate courts should utilize when reviewing the propriety of a judgment N.O.V. Petitioners allude to a conflict in the circuits in their statement of this issue but then address this alleged conflict only in a footnote stating that there is a difference among the circuits as to whether a state standard or a federal standard should be applied in diversity cases for granting a judgment N.O.V. Petition at 18 n.6. Even if such a conflict existed, petitioners' muted argument on this issue is understandable because the Indiana state standard utilized by the Court of Appeals in this case and the federal standard are virtually identical. Hence, on the facts of this case, there is no genuine conflict for this Court to address.[3]

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3. Petitioners state the federal standard for grant or denial of a motion for judgment notwithstanding the verdict as: "whether there is evidence upon which the jury could properly find a verdict for that party. The sufficiency of the evidence supporting a jury verdict is a question of law which the court determines." Petition at 14 (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971)). This federal standard implemented by the Seventh Circuit when its jurisdiction is based on a federal question has been more completely stated as follows:

> [t]he motion [for JNOV] should be denied where the evidence, along with all the inferences to be reasonably drawn therefrom, when viewed in a light most favorable to the party

Petitioners are in reality seeking an advisory declaration of whether federal or state standards apply and a further factual review in this Court under what, in either event, will be the same standard applied below. Such a request for what amounts to nothing more than a further factual review by this Court is inappropriate. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."), *cited with approval in Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

Petitioners' argument is also squarely at odds with the position they took below. In their brief to the Seventh Circuit they urged the Indiana state standard on the court. In their

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> opposing such motion, is such that [people] in a fair and impartial exercise of their judgment may reach different conclusions.

McKinley v. Trattles, 732 F.2d 1320, 1323–1324 (7th Cir. 1984)(quoting *Kolb v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981)).

The Indiana standard utilized by the Seventh Circuit in this diversity case is fully in accord with the federal standard. The standard utilized by the Seventh Circuit in this case was stated as follows:

> The motion for a post–verdict judgment on the evidence must be granted where the verdict is not supported by sufficient evidence. In deciding the motion, the trial court must "view only the evidence favorable to the non–moving party and the reasonable inferences to be drawn from that evidence." *Huff v. Travelers Indemnity Co.*, 266 Ind. 414, 363 N.E.2d 985, 990 (1977). Accordingly, the "trial court may enter judgment only *if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim*, i.e., the evidence must point unerringly to a conclusion not reached by the jury." *Id.* (citation omitted and emphasis in original).

797 F.2d at 1410.

Petition For Rehearing And Suggestion For Rehearing *In Banc*, petitioners again urged the Indiana standard:

> Because this is a diversity case, the standard which governs the review of the district court's denial of defendant's motion for JNOV is found in state law. In this instance, Indiana law governs. The Indiana standard for granting such motion is "extremely high." Indiana R.Civ.P.50; *Haugh v. Jones & Laughlin Steel Corp.*, 101 F.R.D. 88, 91 (N.D. Ind. 1984).

Respondents' appendix B. This petition for a writ of certiorari, arguing the impropriety of applying the Indiana standard, is not only inappropriate, but disingenuous. The writ should be denied for this reason alone. *Cf. Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question was not raised in Court of Appeals and is not properly before us"). *See generally Robinson v. Lescrenier*, 721 F.2d 1101, 1103 n.1. (7th Cir. 1983) ("Because the parties in this case did not dispute that state law governed with respect to the standard for review of a motion for judgment n.o.v., and because we find evidence in the record to meet either the federal or state standard, we are unwilling to reach the issue of whether the federal or state rule should apply . . . .").[4]

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4. Petitioners' also suggest in a footnote that this Court should seize upon this case as an opportunity to announce that the standard for deciding a motion for judgment N.O.V. should not be the same for the trial court and the appellate court. Petition at 19 n.8. This issue was never presented below, and it has been essentially resolved by this Court in any event. In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1966), the question was whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment N.O.V., may itself order dismissal or direct entry of judgment for defendant. This Court held: "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment N.O.V. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment N.O.V." *Neely*, 386 U.S. at 322. *See also Powell v. J.T.*

C. THE TWENTY-FOUR MUTUAL RELEASES FOUND TO BE VALID BY THE COURT OF APPEALS CONSTITUTE AN ALTERNATIVE BASIS FOR THE DECISION BELOW AND FORECLOSE A REVIEW OF THE ISSUES SOUGHT TO BE PRESENTED BY PETITIONERS.

In their attempt to find an issue to put before this Court, petitioners have largely disregarded the dispositive alternative basis on which the Court of Appeals reversed the judgment below. The Court of Appeals held: "[A]s an alternate ground for our disposition of this case, we conclude that, as a matter of law, the mutual releases executed by the parties are a bar to this action." 797 F.2d at 1416. This alternative basis for the Court of Appeals' reversal is dispositive of petitioners' case and should also preclude further review by this Court.

Beginning in 1971 and ending in 1981, petitioners and respondents executed twenty–four separate written agreements in which petitioners fully released all claims against respondents. The generally recognized policy favoring the enforceability of releases has time and again led to summary disposition of claims brought by franchisees who had previously executed releases with their franchisors. *See Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Redel's Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888 (7th Cir.), *cert. denied*, 384 U.S. 939 (1966).

In this case, petitioners relied on their amorphous allegations of a ten–year fraud, in which respondents allegedly misrepresented their commitment to and the viability of the

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Posey Co., 766 F.2d 131, 134 (3d Cir. 1985) ("On appeal, the appellate court should apply the same standard as the trial court in determining the propriety of a judgment n.o.v."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971) (standard for passing on the sufficiency of the evidence is the same in the trial court and on appeal).

franchise system, as a basis to invalidate the releases executed over that period. The law is clear, however, that such general allegations of an underlying fraud will not invalidate a general release of all claims. In order to avoid the releases on the basis of fraudulent inducement, petitioners must have adduced proof of fraudulent conduct which proximately caused them to sign the releases. For example, in entering summary judgment for the defendant based on a release despite plaintiffs' claim of fraudulent inducement, the court in *Schmitt–Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099 (D. Minn. 1981), *aff'd mem.*, 685 F.2d 438 (8th Cir. 1982) stated:

> The Court finds that the plaintiffs have failed to establish that the defendant's alleged acts, even if taken as true, caused the plaintiffs to sign the release. Assuming as plaintiffs claim that the defendant misrepresented relocation costs and the projected profitability of the new location, threatened termination or non–renewal of the franchise agreement, and shipped the dealership unpopular vehicles, the plaintiffs have failed to show how these acts caused them to sign the release. The defendant's acts may have caused the plaintiffs to move to a new location but they did not directly cause the plaintiffs to sign the release. . . . The plaintiffs do not claim they were misled about the nature of what they were signing but merely that they did not fully understand its implications, which is at most a claim of unilateral mistake not of fraud. . . .

Id. at 1104. *See also Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1306, 1313–15 (5th Cir. 1983). Petitioners' burden of establishing fraudulent misrepresentations inducing the execution and hence the separate invalidity of each of the twenty–four releases executed at various times over a ten–year period would, of course, have been monumental. Petitioners made no attempt to satisfy that burden, and there is

consequently not one shred of evidence in the record that petitioners were fraudulently caused to sign the releases so as to vitiate their dispositive effect.

Because the Court of Appeals found that a *prima facie* case was not made out with respect to any of the elements of the underlying fraud relied upon by petitioners to invalidate the releases, it did not address the question of whether such a fraud could have invalidated the releases absent further proof of fraud in the execution of the releases themselves. It is respectfully submitted, however, that the indisputable absence of such further proof renders the releases unassailable as an independent basis on which to uphold the judgment below.

A writ of certiorari would bring before this Court, therefore, not only the fuli factual record on which the Court of Appeals found that there had been a failure of proof on the underlying fraud, but also the dispositive effect of the releases under state law. *See Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit"); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or Court of Appeals"). Where, as here, there is an essentially undisputed dispositive basis on which to affirm the judgment below, petitioners' attempt to raise other issues concerning the adequacy of proof of the underlying fraud, which need never be reached, is inappropriate. *See generally Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of Al Vaughn, Marjorie Vaughn, Algon Corporation and Springfield Drive-Ins, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Dated: January 8, 1986

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 24, 1986

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. _____

Hon. _____

AL VAUGHN, et al.,
Plaintiffs–Appellees,

v.

GENERAL FOODS CORPORATION and BURGER CHEF SYSTEMS, INC.,
Defendants–Appellants.

No. 85–1847

Appeal from the United States District Court for the Northern District of Indiana
Hammond Division
No. 82 C 621
Judge Michael S. Kanne

This matter comes before the court for its consideration of the "MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI" filed herein on September 17, 1986, by counsel for the plaintiffs–appellees.

The issues which the appellees propose to present to the Supreme Court of the United States in their petition for certiorari were thoroughly considered by the panel in its deliberations on this case. Moreover, these issues are very fact–specific and dependent on questions of state law. Since there is no reasonable probability that the Supreme Court will grant certiorari and even less of a possibility that, if certiorari were granted, further review would result in reversal, the motion for stay of mandate pending application for a writ of certiorari is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85–1847

Al Vaughn, Marjorie Vaughn,
Algon Corporation and
Springfield Drive–Ins, Inc.,

Plaintiffs–Appellees,

v.

General Foods Corporation and
Burger Chef Systems, Inc.,

Defendants–Appellants.

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August 11, 1986

ARGUMENT

I. The Panel's Review Of The Evidence On An Appeal Of A JNOV Is In Conflict With Prior Opinions Of This Circuit And Effectively Negates Plaintiffs' Right To A Jury Trial.

There are many decisions of the Seventh Circuit which uphold jury verdicts in the face of motions for new trials or motions for judgments notwithstanding the verdict ("JNOV"). *See In Re Innovative Construction Systems, Inc.*, 230 U.S.P.Q. 94, 98 (7th Cir. 1986) (on appeal, deference owed to jury); *Dickerson v. Amax Inc.*, 739 F.2d 270 274 (7th Cir. 1984) (jury function to sift evidence and assess credibility). These opinions are founded on the deference our judicial system pays to the Seventh Amendment right to trial by jury. Even a cursory examination of the panel opinion in this case indicates that the panel has usurped the role of the jury, in contradiction to the Seventh Circuit cases cited above.

Because this is a diversity case, the standard which governs the review of the district court's denial of defendants' motion for a JNOV is found in state law. In this instance, Indiana law governs. The Indiana standard for granting such a motion is "extremely high." Indiana R. Civ. P. 50; *Haugh v. Jones & Laughlin Steel Corp.*, 101 F.R.D. 88, 91 (N.D. Ind. 1984).

The appellate court must look to see whether there is

> "evidence of probative value to support each essential element of the claim. If there is relevant evidence to support the claim, but the evidence conflicts, the verdict is not clearly erroneous, and judgment on the evidence notwithstanding the verdict is improper."

Dickerson v. Amax Inc., 739 F.2d 270, 273, *quoting Elsperman v. Pump*, 446 N.E.2d 1027, 1030 (Ind. App. 1983). The

reviewing court is to view "'only the evidence most favorable to the verdict together with all favorable inferences flowing therefrom.'" *Dickerson*, 739 F.2d at 273, quoting *Long v. Johnson*, 177 Ind. App. 663, 669, 381 N.E. 2d 93, 98 (1978). The appellate court is not to weigh the evidence nor resolve questions of credibility. *Id.*

Thus, in *Dickerson*, even though the Seventh Circuit found that the evidence was "in sharp conflict," it deferred to the jury's resolution of the conflict. "It is uniquely the function of the jury to sift through the evidence adduced at trial and assess the credibility of witnesses." 739 F.2d at 274. Similarly, the district court in *Karczewski v. Ford Motor Co.*, 382 F. Supp. 1346, *affirmed without opinion*, 515 F.2d 511 (7th Cir. 1975), said

> Motions for directed verdict or for judgment N.O.V. are proper only when there is *a complete absence* of any evidence to warrant submission to a jury . . . . The fundamental idea in [the various expressions of the general standard] compels a Federal district trial judge to exercise the greatest self–restraint in interfering with the constitutionally mandated processes of jury decision. The message is to do so only in the clearest of cases

382 F. Supp. at 1348 (emphasis added).

That *Vaughn* is not the "clearest of cases" is shown in several respects. First, the trial judge, the "thirteenth juror," found that plaintiffs had given "many examples," in their opposition to the defendants' JNOV motion, of evidence from which the jury could have reached its conclusion. Order Denying Defendants' Post–trial Motions, May 3, 1985.[1] Second, although stating it has reviewed the record, the appellate panel has not shown any

1. On appeal, there is no claim of error in the jury instructions and apparently the panel found none.

indication of having reviewed the evidence upon which the Vaughns rely. This can be demonstrated by an examination of two areas — fraudulent representations and a duty to disclose.

* * *